



2  
OCT 3 1944

CHARLES ELMORE CROPLEY  
CLERK

**IN THE  
SUPREME COURT OF THE UNITED STATES.**

October Term, 1944.

No. 466.

---

SKINNER MANUFACTURING COMPANY,  
a Nebraska Corporation,

*Petitioner,*

VS.

GENERAL FOODS SALES COMPANY, INC.,  
a Delaware Corporation,

*Respondent.*

---

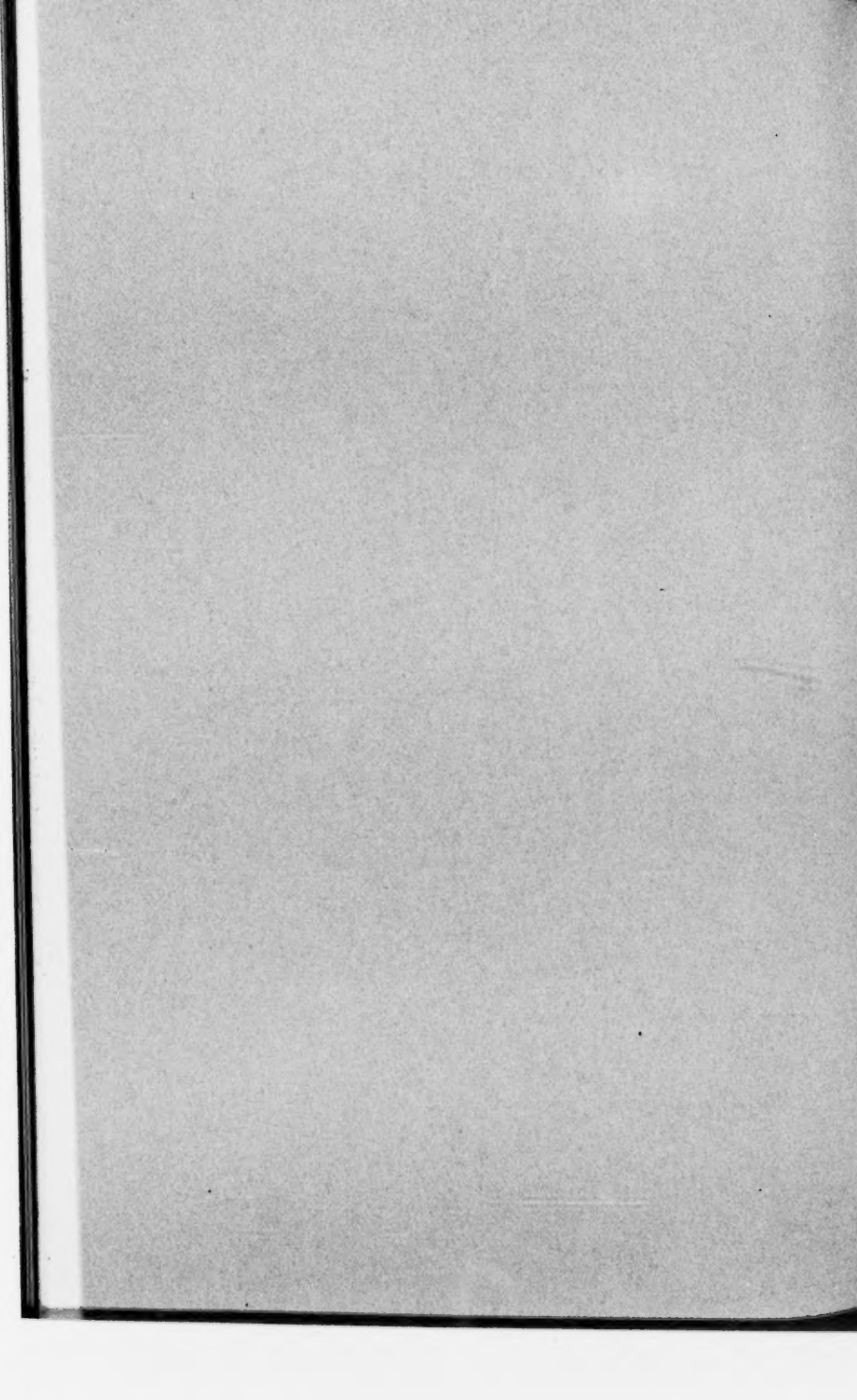
**RESPONDENT'S BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI.**

---

LESTER E. WATERBURY,  
*Attorney for Respondent,*  
No. 250 Park Avenue,  
New York 17, N. Y.

LESTER E. WATERBURY,  
EDGAR M. MORSMAN, III,  
Omaha, Neb.,  
*Of Counsel.*

---



## CONTENTS.

	PAGE
Opinions Below .....	1
Argument . . . . .	1

## AUTHORITIES.

### *Cases.*

<i>Cleo Syrup Corporation v. Coca-Cola Co.</i> (1943) 139 F. (2d) 416 (C. C. A. 8), certiorari denied (1944) 321 U. S. (No. 1) iv. ....	3
<i>District of Columbia v. Pace</i> (1944) 320 U. S. 698....	3, 4

### *United States Supreme Court Rules.*

Rule 38 (2) .....	1
Rule 38 (5) (b) .....	2, 5

### *Rules of Civil Procedure.*

Rule 52 .....	3
---------------	---

### *Text.*

3 RESTATEMENT OF THE LAW OF TORTS (1938) §721....	4
---	---



**IN THE  
SUPREME COURT OF THE UNITED STATES.**

October Term, 1944.

No. 466.

---

SKINNER MANUFACTURING COMPANY,  
a Nebraska Corporation,

*Petitioner,*

vs.

GENERAL FOODS SALES COMPANY, INC.,  
a Delaware Corporation,

*Respondent.*

---

**RESPONDENT'S BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI.**

---

**Opinions Below.**

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (Transcript, Vol. VI, pp. 3-11) is unreported. The opinion of the United States District Court for the District of Nebraska (Transcript, Vol. I, pp. 67-104) is reported in 52 F. Supp. 432.

**Argument.**

It may be observed at the outset that petitioner's brief in support of its petition is in conspicuous violation of the requirement in this Court's Rule 38 (2) that supporting

briefs "must be direct and concise"; such a violation, the rule states, is "sufficient reason for denying the petition". Respondent ventures the suggestion that the rule might well be applied in this case.

---

Neither the petition nor the supporting brief discloses any reason for granting a writ, albeit the petition (pp. 18-23) lists eight alleged reasons. None of them meets the requirements of this Court's Rule 38 (5) (b). Alleged reasons (1), (2), (3), and (5) refer to alleged conflicts between decisions of United States Circuit Courts of Appeals. The rule relating to the granting of writs because of such conflicts confines the area to conflicts "on the same matter". The "matter"<sup>1</sup> litigated below was the alleged invasion by respondent's dry breakfast cereal "Post's Raisin Bran" of petitioner's trade rights in its dry breakfast cereal "Raisin-BRAN". There has been no prior litigation involving these products, and there can therefore be no conflict between decisions of United States Circuit Courts of Appeals within the meaning of that rule. Alleged reasons (4), (6), (7), and (8) are not even remotely related to anything found in Rule 38 (5) (b).

In petitioner's brief (pp. 27-30) there is at least the suggestion of a further reason, *i. e.*, a reason under that part of Rule 38 (5) (b) dealing with important questions of federal law which have "not been, but should be, settled by" this Court. The Circuit Court of Appeals for the

---

<sup>1</sup> WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d Ed., 1935), p. 1515:

"Matter, *n.* 9. Material treated or to be treated in a book, speech, legal action, or the like; subject of, or subject matter for, discussion, argument, exposition, etc., whether oral or written; as, events that give *matter* to preachers and writers; to ask the *matter* in dispute."

Eighth Circuit in the case below and in other cases has refused to retry issues of fact. [See particularly that court's opinion in this case and in *Cleo Syrup Corporation v. Coca-Cola Co.* (1943) 139 F. (2d) 416 (C. C. A. 8), certiorari denied (1944) 321 U. S. (No. 1) iv.] That policy is, of course, the policy laid down by Rule 52 of the Rules of Civil Procedure, which says that "findings of fact shall not be set aside unless clearly erroneous." Notwithstanding that language petitioner argues that an appellant has the right to require the appellate court to "try the case de novo"; that that right was denied by the court below; and that, while this Court "has not passed definitely" on the question, it is inclined against the view of the court below, such inclination allegedly being shown by certain language in this Court's opinion in *District of Columbia v. Pace* (1944) 320 U. S. 698.

The simple answer to all this is that, under modern federal equity practice, appellants have no right to a trial *de novo* in the appellate court. This is made perfectly clear in Mr. Justice Jackson's opinion in the *Pace* case, where he said, speaking of the state of the law in 1938 prior to the adoption of the new rules (p. 701):

Findings of fact by the trial judge of course were presumptively correct and were accepted by reviewing courts unless clearly wrong.

The language of R. C. P. 52 is not only virtually identical but was intended by the lawyers who framed the rules to accord "with the decisions on the scope of the review in modern federal equity practice."<sup>2</sup> The modern federal equity rule, as Mr. Justice Jackson points out

---

<sup>2</sup> RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH INDEX AND NOTES (Government Printing Office, 1939) p. 264.



(p. 702), did not deny the appellate court power to review facts, "but rather went to the weight to be accorded to the findings of a lower court and had special pertinence where credibility of witnesses was involved."

---

The essence of petitioner's claim below was that it had acquired by use exclusive trade rights in the expression "Raisin-BRAN" as applied to a dry breakfast cereal composed of bran and raisins and that respondent's use of the expression "Post's Raisin Bran" upon a like cereal infringed those rights. The issue was therefore drawn as to whether petitioner's designation "Raisin-BRAN" was or was not merely descriptive of the product, it being horn-book law that a trader can acquire no exclusive rights in a designation that is merely descriptive of his product. [3 RESTATEMENT OF THE LAW OF TORTS (1938) §721.]

On the controlling fact questions (a) whether "Raisin-BRAN" was or was not merely descriptive of petitioner's product and (b) whether or not respondent had committed any acts of unfair competition, the trial court found as follows (Transcript, Vol. I, p. 123):

41.

The name Raisin BRAN is not and never has been an arbitrary or fanciful term when applied to a dry prepared breakfast cereal consisting of a cereal flake base having a higher bran content than normal whole wheat flakes, with added whole raisins. On the contrary, it is and always has been descriptive of the product to which it has been applied. And this descriptive quality of the name has been the more exact and complete because of the employment both before and since the introduction of plaintiff's product in

the cereal food trade of the terms "Bran" and "Bran Flakes" to describe and characterize bran type cereals.

## 42.

There has been no unfair competition by General Food Corporation<sup>3</sup> or by defendant in the marketing of said product manufactured by General Food Corporation and marketed by defendant and said product has not been passed off as that of plaintiff.

Those findings were attacked by petitioner in the court below, they were reviewed by that court, and they were sustained by it. Petitioner has had its day in court and the benefit of a painstaking appellate review of the entire case. Every litigation must end sometime. No reason within this Court's Rule 38 (5) (b) appearing for any further review, this litigation should end now.

The petition should be dismissed.

Dated: New York, N. Y., October 2, 1944.

Respectfully submitted,

LESTER E. WATERBURY,  
*Attorney for Respondent,*  
No. 250 Park Avenue,  
New York 17, N. Y.

LESTER E. WATERBURY,  
EDGAR M. MORSMAN, III,  
Omaha, Neb.,  
*Of Counsel.*

---

<sup>3</sup>The correct name of the corporation referred to is General Foods Corporation.